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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 In re: FOREIGN EXCHANGE  
4 BENCHMARK RATES  
ANTITRUST LITIGATION

13 Cv. 7789 (LGS)

5 -----x

6 June 5, 2017  
7 10:30 a.m.

8 Before:

9 HON. LORNA G. SCHOFIELD

District Judge

10 APPEARANCES

11 SCOTT & SCOTT LLP

12 Attorneys for Haverhill Plaintiffs

13 BY: CHRISTOPHER M. BURKE

KRISTEN M. ANDERSON

14 HAUSFELD LLP

Attorneys for Haverhill Plaintiffs

15 BY: MICHAEL D. HAUSFELD

16 QUINN EMANUEL URQUHART & SULLIVAN LLP

Attorneys for Third Party Plaintiffs

17 BY: RICHARD I. WERDER, JR.

DANIEL L. BROCKETT

18 BERNSTEIN LIEBHARD LLP

19 Attorneys for Third Party Plaintiffs

20 BY: STANLEY D. BERNSTEIN

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1 (Case called)

2 THE DEPUTY CLERK: Everyone can be seated.

3 Counsel at the table, please state your name for the  
4 record.

5 MR. BURKE: Good morning, your Honor. Chris Burke  
6 from Scott & Scott.

7 THE COURT: Good morning.

8 MS. ANDERSON: Good morning, your Honor. Kristen  
9 Anderson from Scott & Scott.

10 THE COURT: Good morning.

11 If you would please speak into the microphone.

12 MR. HAUSFELD: Good morning, your Honor. Michael  
13 Hausfeld from Hausfeld LLP.

14 THE COURT: Good morning.

15 MR. WERDER: Good morning, your Honor. Richard Werder  
16 from Quinn Emanuel.

17 THE COURT: Good morning.

18 MR. BROCKETT: Good morning, your Honor. Dan Brockett  
19 from Quinn Emanuel.

20 THE COURT: Good morning.

21 MR. BERNSTEIN: Good morning, your Honor. Stanley  
22 Bernstein from Bernstein Liebhard.

23 THE COURT: Good morning.

24 I wanted to have a conference to discuss the  
25 plaintiffs' application for certain materials as well as the

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1 identities of what I gather are potential clients of both Quinn  
2 and Bernstein.

3 I have read the materials that you have submitted. I  
4 thought perhaps a recap from Mr. Burke or Mr. Hausfeld of where  
5 we are would be appropriate. I actually checked the docket  
6 sheet to make sure I knew where we are in terms of a notice  
7 date, but if you could just put that on the record so that we  
8 are all starting in the same place.

9 You might also tell me how many defendants you settled  
10 with, to what extent the settlements are public, what the  
11 status of any remaining settlement discussions is, to the  
12 extent you can discuss it, and then the notice date that has  
13 been ordered.

14 MR. BURKE: Yes, your Honor.

15 In terms of the defendants in this case, there were 16  
16 defendants. We settled with nine. Those are public. We  
17 planned on coming to the Court with a motion for preliminary  
18 approval as to five additional settlements. That will leave  
19 two defendants outstanding, and it's my belief we are going to  
20 litigate into the future with those two defendants.

21 THE COURT: Then as to the five, do you have a date  
22 when you're planning to make the motion?

23 MR. BURKE: July 28 we plan on bringing the motion for  
24 preliminary approval as well as presenting the Court with some  
25 additional papers, such as an updated notice, updated material

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1 with respect to the plan of distribution, that type of thing.

2 THE COURT: And that would have a proposed schedule  
3 of -- let's assume it were approved relatively promptly, to the  
4 extent it is approved, what kind of actual notice date are we  
5 looking at and when would you be prepared to give that notice?

6 MR. BURKE: We would be prepared to provide notice by  
7 October 23rd.

8 THE COURT: The reason we are in this situation to  
9 some extent, I know, is because of the massive size of the  
10 materials that are relevant to your settlement discussions.  
11 But at bottom, we are also here just because it has taken so  
12 long, and if notice had gone out, the situation would not be as  
13 serious or concerning to me as the supervisor of communications  
14 with the class if it hadn't been so long.

15 So I guess my first question is, October 23rd seems  
16 like a long way out. If I can get you a decision pretty  
17 promptly on a July 28 motion, is it possible that you can move  
18 the notice date up just so that we are not in this kind of  
19 limbo for so long?

20 MR. BURKE: The reason we set the notice date out to  
21 October 23rd is the data issue, and it's obtaining sufficient  
22 counterparty information so that notice is complete and  
23 accurate as to all class members, and it's class members who  
24 are domiciled both here and outside the United States.

25 THE COURT: Are you ready to go with notice as to the

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1 nine?

2 MR. BURKE: We are.

3 THE COURT: So it's just a matter of collecting the  
4 data as to the others.

5 MR. BURKE: Yes.

6 THE COURT: I am going to ask you to be prepared to do  
7 your notice the beginning of October, by October 1, and that,  
8 of course, is subject to any approval or nonapproval. My  
9 reason is that I don't want to put all of us in a position we  
10 are in right now for any longer than necessary.

11 MR. BURKE: Yes, your Honor.

12 THE COURT: Thank you.

13 So I know what your application is, and I guess my  
14 next question is, have there been any further discussions with  
15 the folks from Quinn and Bernstein to try to resolve or narrow  
16 the issues?

17 MR. BURKE: Beyond what has been submitted to the  
18 Court in terms of an opening, an opposition, a reply, and the  
19 application for surreply and our opposition, there has been no  
20 further discussions, your Honor.

21 THE COURT: Thank you. You may be seated.

22 What I would like to do now is talk to the second  
23 table, and I'm not sure who is speaking, but what I would like  
24 to know are what communications there were. I know there is  
25 the initial memo that we have all talked about, and that I have

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1 seen and plaintiffs' counsel has seen in confidence. I know  
2 there was an updated memorandum. I know there were cover  
3 e-mails, the substance of which have been summarized in your  
4 papers. What other communications have there been since that  
5 initial e-mail?

6 MR. WERDER: Your Honor, Richard Werder from Quinn  
7 Emanuel.

8 I think, other than what your Honor summarized in  
9 terms of written communications, the only additional set of  
10 communications that I am aware of is a set of communications  
11 that we sent to the recipients of both the original and the  
12 revised memorandum that enclosed a copy of Professor Evans'  
13 declaration, and there was a cover memo that went along with  
14 that. But the Evans declaration was sent to all of the  
15 recipients of the original and revised memorandum.

16 THE COURT: When we are talking about the recipients  
17 of the original and revised memorandum, we are still talking  
18 about the eight entities that Quinn sent the initial memorandum  
19 to and the 13 entities that Bernstein sent it to?

20 MR. WERDER: That's correct, your Honor. I believe  
21 that the cover memo that accompanied the Evans declaration was  
22 also sent to the two additional contacts that are referenced in  
23 the materials that you have before you that we discussed.

24 THE COURT: Can you remind me who those are?

25 MR. WERDER: In addition to the eight that Quinn sent

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1 the original memorandum to, our papers indicate that we also  
2 discussed the 6,000 trillion estimate with two additional  
3 clients, and I believe that those are potential clients, and  
4 those two additional contacts also received the Evans  
5 declaration in addition to the 21 who actually have received  
6 the memorandum.

7 THE COURT: So the two additional contacts did not see  
8 the memorandum or updated memorandum?

9 MR. WERDER: That is correct, your Honor.

10 THE COURT: So we are really talking about contacts  
11 with 23 entities, is that right?

12 MR. WERDER: That's my count, your Honor, yes.

13 THE COURT: My next question is, is there an  
14 attorney-client relationship with any of those 23 entities  
15 currently with regard to Forex matters?

16 MR. WERDER: I don't believe so, your Honor, other  
17 than to the extent that there is a privilege attached to the  
18 potential preliminary discussions, but I don't believe that any  
19 of those clients have formally engaged either our firm or the  
20 Bernstein firm for purposes of the FX litigation.

21 THE COURT: Just so you understand where I am coming  
22 from, as I ask you the questions and as we discuss this, my  
23 principal concern -- and it seems to be the concern of counsel  
24 at both tables as well -- is to assure that potential class  
25 members have fair and accurate information about the proposed

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1 settlement.

2 MR. WERDER: We certainly share that concern, your  
3 Honor.

4 THE COURT: To that end, I feel an obligation, and I  
5 think have legal authority, to assure that the communications  
6 have been and to the extent there are any future are accurate.

7 I will also say that -- we can talk about it in  
8 greater detail -- I don't think these communications are  
9 privileged because they don't seem to have been made in the  
10 context of a confidential attorney-client relationship for the  
11 purpose of giving legal advice. Notwithstanding that, I don't  
12 think that necessarily means that class counsel have the right  
13 to any and all information you might have about these entities,  
14 because it's not only not privilege but relevant here, and I  
15 think you pointed some of that out in the papers.

16 My next question is, have you made inquiries whether,  
17 I guess, these 23 recipients have passed on the writings that  
18 you have provided to them and talked about to any other  
19 entities?

20 MR. WERDER: Yes, your Honor. I believe that we have  
21 made inquiries of all or most of them to determine that they  
22 have not done so, and to the extent that I am aware of the  
23 communications, the indications have been that they have not  
24 passed them on to third parties.

25 THE COURT: So you have made affirmative inquiries of



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1 all 23 and you have responses back from all 23 that they have  
2 not passed it on?

3 MR. WERDER: Let me just consult for one second, your  
4 Honor.

5 THE COURT: OK.

6 MR. WERDER: Your Honor, I don't believe we have  
7 responses from all 23. I think what we did is when we  
8 communicated the updated memo, we asked the clients to advise  
9 us if they had passed it on, and I don't think all of them have  
10 responded to that, but the ones that have responded have  
11 indicated that they have not done so.

12 THE COURT: All right. And do you intend to send out  
13 any similar communications between now and the beginning of  
14 October?

15 MR. WERDER: I don't believe that that was our plan,  
16 your Honor, other than to the extent that your Honor requests  
17 that we send out some additional information relating to what  
18 has already been sent.

19 THE COURT: OK. So were there any attachments to the  
20 communications to the 23 entitites?

21 MR. WERDER: Well, I think the attachments were the  
22 original memo, and that had a data sheet attached to it, which  
23 I believe was in a filing that perhaps your Honor rejected, but  
24 it was in the court file, a one-page data sheet.

25 THE COURT: What do you mean by a one-page data sheet?

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1 MR. WERDER: There was a sheet that was attached to  
2 the original memo that allowed the clients to provide us with  
3 information concerning their Forex trades so that we could  
4 further advise them on whether they had a sufficiently large  
5 claim that an opt out might be worth further consideration.

6 THE COURT: I have seen at least reference to the data  
7 sheet. I think I have also seen the data sheet even with your  
8 original filings. In any event, what I am trying to find out  
9 is, apart from the documents that we know about -- namely, the  
10 initial memorandum, the updated memorandum, and the e-mails  
11 that we are going to talk about in a minute, and the expert  
12 report, the Evans expert report -- are there any other written  
13 materials that have been sent to the 23 entities about the  
14 proposed settlement?

15 MR. WERDER: I think that most of the follow-up, your  
16 Honor, was oral, but there may have been some e-mail  
17 communication that involved assessment of preliminary data that  
18 the potential clients provided with respect to the volume of  
19 their trading. But in terms of a presentation-type document,  
20 like a memorandum, no.

21 THE COURT: How many potential clients are we talking  
22 about with whom you had a further e-mail exchange?

23 MR. WERDER: I am not sure that I have the exact  
24 number of that. I would like to consult with Mr. Brockett  
25 briefly.

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1 THE COURT: Sure.

2 MR. WERDER: Mr. Brockett advises me that it's three  
3 to five, at most, that there was any follow-up with along the  
4 lines that I have just described.

5 THE COURT: Would you have any objection to providing  
6 to the Court and to class counsel -- let's sort of begin with  
7 the least objectionable and then make our way through the  
8 list -- the cover e-mails with the original memorandum and the  
9 updated memorandum redacting the identities?

10 MR. WERDER: We certainly have no objection to  
11 providing it to the Court, your Honor, and with the  
12 qualification of the identities redacted, we could probably  
13 wrap our heads around also providing it to the class counsel.  
14 But I think our preference would be, in the first instance, to  
15 provide it to the Court for the court's review so that the  
16 Court can determine whether there are any concerns that justify  
17 also providing it to class counsel even in a redacted form.

18 THE COURT: The concern, of course, is that class  
19 counsel is much closer to the settlement and much more attuned  
20 to anything that might potentially be mistaken or misleading  
21 than I would be. So what I would order then with respect to  
22 those e-mails is that you provide them to me, that you provide  
23 them to class counsel, and you may redact any references that  
24 you think could reveal the identity of the recipients. Please  
25 give me both the redacted and unredacted copy just so I can see

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1 both versions.

2 MR. WERDER: Certainly, your Honor. When you refer to  
3 redaction to any information relating to potential identifying  
4 information, that includes, I assume, not only the identity of  
5 the recipients, but anything that might be in the text of the  
6 correspondence that could tend to have that same effect.

7 THE COURT: Yes. But as I said, give it to me, and I  
8 will make a determination whether I think it really warrants  
9 redaction.

10 MR. WERDER: Thank you, your Honor.

11 THE COURT: So the next thing is cover e-mails with  
12 the Evans opinion. I guess those were sent to the two plus the  
13 21. Is there any objection to doing the same with those?

14 MR. WERDER: Subject to the same parameters that your  
15 Honor just indicated, we are happy to provide those.

16 THE COURT: And then talk to me about the e-mail  
17 follow-up with the three to five entities concerning the  
18 settlement.

19 MR. WERDER: I'm not sure that I have looked at all of  
20 it, your Honor, but the ones that I looked at were -- the way  
21 that I would describe it would be communication with the  
22 potential client, after receiving some preliminary information  
23 about what they might have at stake, along with a  
24 recommendation. I think there were, as I said before, just a  
25 handful of those.

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1 THE COURT: So what I will ask you to do is give them  
2 to me in the first instance, and I will take a look at them,  
3 and if I decide that you need to distribute them any more  
4 broadly, I will make that decision or we will have a discussion  
5 about it.

6 MR. WERDER: Understood, your Honor.

7 THE COURT: So is there anything else in writing that  
8 has gone to these various entities?

9 MR. WERDER: Not to this group, but we do, as our  
10 papers revealed, your Honor, have some clients that have  
11 actually retained us, and obviously we have had significant  
12 communications with those entities. But as far as the group  
13 that we are here today discussing, I don't believe there is  
14 anything else.

15 THE COURT: So let me make sure I understand.

16 There is a separate group of clients who retained you  
17 in connection with Forex. And I presume that these client  
18 relationships are longer standing than the few months we are  
19 talking about since the original memorandum went out September  
20 2016, is that right?

21 MR. WERDER: Yes, your Honor. I think our activity in  
22 this area goes back to 2013. So there have been a number of  
23 clients that over the period of time from 2013 through, I  
24 think, sometime last year engaged us to represent them with  
25 respect to Forex matters, but none of the clients that we are

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1 talking about today did so.

2 THE COURT: The clients who retained you previously,  
3 did they have copies of the memorandum and updated memorandum?

4 MR. WERDER: No, they did not, your Honor.

5 THE COURT: All right. You may be seated. Let me  
6 just talk to the class counsel.

7 MR. WERDER: Thank you, your Honor.

8 THE COURT: As you can see, I am tending in the  
9 direction of not requiring any disclosure of the identity of  
10 these potential clients, not because they are privileged,  
11 because I don't think they are privileged, but because I don't  
12 know that you have a need for them in your representation of  
13 the class, and I don't think that I do either, but let me hear  
14 from you before I finally decide that.

15 MR. BURKE: As the cases we have presented to the  
16 Court make clear, the Court's authority, especially in this  
17 type of situation, is to consider whether or not  
18 representations have been made to threaten confusion among  
19 class members as to the threshold issue of whether or not to  
20 participate in the class, object, opt out, and otherwise  
21 compromise their rights.

22 Before the Court can take any further action, *Gulf Oil*  
23 tells us let's make sure the factual record is complete. And  
24 as I understand what the Court has endeavored to do today is to  
25 complete that factual record, and then analyze what has been

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1 said, and then determine whether additional communications,  
2 curative relief, need to be made. I think that's exactly the  
3 right step to take, and we don't need the identities of the  
4 class members at this point. It may come to pass, in order to  
5 craft appropriate curative relief, that the identities or types  
6 of class members need to be known, but at this point we don't  
7 need it.

8 THE COURT: So it sounds like the dispute is resolved  
9 for the moment.

10 Is there anything else you need to address from your  
11 point of view as long as you're standing?

12 MR. BURKE: No, your Honor. Thank you.

13 THE COURT: Let me ask the back table, Mr. Bernstein  
14 and the Quinn folks, is there anything else?

15 MR. WERDER: We have nothing else, your Honor.

16 THE COURT: Thank you very much.

17 I will issue an order that briefly summarizes what I  
18 ruled today.

19 (Adjourned)  
20  
21  
22  
23  
24  
25